BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID D. EDIGER Claimant VS. **KANSAS HEART HOSPITAL, L.L.C.** Respondent AND **COMMERCE & INDUSTRY INS. CO.** Insurance Carrier	)	Docket No. 1,021,158

ORDER

Respondent and its insurance carrier (respondent) request review of the March 28, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ granted claimant's request for preliminary hearing benefits after concluding claimant's accidental injury arose out of and in the course of his employment with respondent.

The respondent requests review of this decision alleging the ALJ erred in finding claimant's accident was compensable under Kansas law. Specifically, respondent maintains that claimant was injured as a result of an act of horseplay or an assault at the hands of a non-co-worker. Respondent contends this act, while admittedly causing claimant injury while working for respondent, did not "arise out of" his employment and under Kansas law, is not compensable.

Claimant argues the ALJ's preliminary hearing Order should be affirmed in all respects. Claimant asserts that his job placed him at increased risk of coming into contact

with members of the general public, like the one who injured him in this instance. Thus, his claim for accidental injury is compensable.

The only issue to be decided in this appeal is whether claimant's accidental injury arose out of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be reversed.

There is no dispute as to the underlying facts which give rise to claimant's injury. On December 18, 2004, claimant was standing at a nurse's station reviewing a patient's lab work. A co-worker had arrived in the area to complete some paperwork she left during her last shift. The co-worker, Sondra Ferguson, was accompanied by her two children, a daughter and a son, Jason, who was 15. For some unexplained reason without provocation, Jason lept onto claimant's back. Not only did this stun and surprise claimant, he immediately felt pain and pressure in his low back.

Claimant sought treatment and has been advised that surgery is required to address a herniated disk at the L5-S1 level. He is presently treating with Dr. John Gorecki and respondent, while contesting the compensability of this claim, does not challenge Dr. Gorecki's recommendations, or claimant's present status as temporarily and totally disabled as a result of this accident.

The ALJ did not offer any analysis which would shed light upon her decision. She merely concluded "[c]laimant has established that it is more probably true than not true, that he was injured while working for the [r]espondent, and that his injury arose out of and in the course of his employment."[1] The Board finds this decision should be reversed.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

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[1] ALJ Order (Mar. 28, 2005) at 1.

[2] K.S.A. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.[4]

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

There is no dispute that claimant was injured in an accident that arose "in the course of" his employment. Rather, the focus is on whether his accident arose "out of" his employment.

The Kansas Supreme Court has created an exception for an assault arising from a dispute over the conditions or incidents of employment.[6] In spite of claimant's contention to the contrary, the Board finds no indication that Jason's acts were in any way related to claimant's employment. The two simply were in the same place at the same time when Jason's immaturity apparently overwhelmed him. Like the co-worker in *Coleman*[7], this was merely a foolish and unexpected act of horseplay by the son of a co-worker.

Similarly, the Board does not find that claimant was at an increased risk for this type of incident in his job as a registered nurse for respondent. Claimant recognizes that normally an injured employee is not entitled to workers compensation benefits when injured in an assault at the hands of a non-co-worker. However, the Kansas Courts have recognized an exception to that rule when there is an increased risk. For example, the employee on a roof who was killed by a sniper was found to be at increased risk because of his location.[8] Similarly, the employee who was raped while working at a hotel in a "high crime" area was entitled to compensation, again because of the increased risk.

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[4] *Id.* at 278.

[5] *Id.* at 278; *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[6] *Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969).

[7] *Coleman v. Armour Swift Eckrich*, No. 1,007,857, 2005 WL 831914 (Kan. WCAB Mar. 31, 2005).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

Claimant contends that his job placed him at increased risk because patients and their families would come and go in the general area where he was working. The Board fails to see how claimant's work area placed him at any greater risk than any other location might have. The mere act of being in a hospital cannot constitute a location of greater risk. If there was evidence of dangerous patients or knowledge that Jason was known to attack individuals, then the Board's conclusion might be different. Nonetheless, given these facts, the Board finds claimant's injury, while unfortunate, is not compensable.

The Board recognizes this view is the minority among the states. However, the Board is constrained by the law and absent some indication that the appellate court is departing from that precedent, it must be followed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 28, 2005, is reversed.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director